

Nov. 12, 1759.

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ANSWERS

F O R

Mr. *Michael Menzies*, Advocate, Trustee
for *Charles Renton* of *Greenhill*, and others,

T O T H E

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PETITION of *James Macharg* of
Keirs, and the Creditors of the de-
ceased *John Gillespie*.

AS the Interlocutor reclaimed against has found the Reasons of Reduction, on Fraud and Circumvention, relevant and proven to reduce the Disposition granted by *Mary Young*, the Respondent's Grandmother, to *John Gillespie*, it is proper to state the Fact a little more particularly than the Defenders have thought fit to do in their Petition.

Mary Young succeeded to her Brother in the Lands of *Greenhill*, after her Marriage with *Alexander Renton*, who, being a very bad Manager, contracted several Debts, particularly to *John Gillespie*, a Horse-couper in the Neighbourhood, who was ready at all times to furnish him with Horses, Oxen, and other bad Pennyworths, at high Prices, knowing that, by his Influence with his Wife, he would prevail upon her to grant Security

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curity for the Debts he could muster up against him, and possibly having an Eye, at the long-run, to carry off the Lands, as afterwards happened.

For these Contractions, and some Debts due by her Brother, she granted *Gillespie* an heritable Bond of Corroboration for 8000 Merks, in 1720, of which above 3400 Merks, appears to have been her Husband's Debt; and, in 1721, she granted him another heritable Bond for 2000 Merks also contracted by her Husband.

On these two Bonds *Gillespie* obtained a Decreet of poinding the Ground in July 1722, for the whole Rents of the Lands of *Greenhill*, except 200 Merks liferented by *Mary Young's* Mother, who died in 1725, though at this time there was not a Year's Annualrent of the 2000 Merks Bond due, and not two upon the 8000 Merks Bond; and, in October 1722, he took out Letters of poinding the Ground, upon which he entered into Possession, and uplifted the Rents of the Lands.

Though *Gillespie's* Debt did not amount to a third of the Value of the Lands, tho' there was no other Debt upon them, and he was, by the poinding of the Ground, secure of Payment of his Annualrents; yet, in order to accumulate the Penalties, he thought fit, in 1723, to adjudge the Land upon these two Bonds, by which he got 1900 Merks of Penalties accumulated, along with the principal Sum and Annualrents.

In 1725, *Mary Young* was induced, by her Husband, to sign another heritable Bond to *Gillespie* for 400 Merks, and soon after her Husband went abroad to *America*, to a first Cousin of his, Mr. *John Menzies* of *Cammo*, Advocate, then Judge-admiral at *Boston*, and left her a Factory, empowering her to manage his Affairs, to grant Provisions to the younger Children; to contract Debts, and to sell his Lands in the Town of *Edinburgh*, and in the Country, but it contains no Power to sell her Lands of *Greenhill*, or any of her own Lands.

In 1727 she gave *Gillespie* an heritable Bond for 1300 Merks, and, in 1731, another for 1000 Merks, upon all which Bonds

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he was infest, and continued in Possession of the Rent from the 1722 downwards, all except the above Lands liferented by her Mother, of which he, *Gillespie*, entered into Possession upon her Death in the Year 1725.

Mr. *Gillespie* having thus got Possession of the Lands on the above heritable Bonds, of which the principal Sums amounted to 12,700 Merks, and a Part of that had been paid by his Possession, seems to have formed a Project to twist the old Woman out of the Property of her Estate. But as this could not succeed as long as she was possessed of any Distinctness of Judgment, or Strength of Mind, she had before refused an Offer of twenty-four Years Purchase made her by Mr. *Lockhart* of *Cleg-horn*, the Superior of the Lands; it was necessary to wait a proper Opportunity, which *Gillespie* found in the End of the Year 1732, when she fell into a severe Sickness in the Month of *October*, which continued down throughout the whole Winter following, so as nobody thought she could survive it; and in this Period *Gillespie* applied to his Doer, Mr. *Richard Dick*, Writer in *Lanerk*, and made him believe she had agreed to a Sale of her Lands, upon which he drew out a Disposition, and brought it down to her House, where she was prevailed on to sign it upon the 15th *December*, and that same Day *Gillespie* was
Dec. 15,
1732.
infest upon it.

By this Disposition she is made to acknowledge, that there was 14,000 Merks due to *Gillespie* at *Martinmas* 1732, though the principal Sums were no more than 12700 Merks, of which some Part had been paid by his Possession, beside the Annual-rents, as will be after mentioned; and no Claim could lie for the Penalties of Bonds granted by a Wife, *stante matrimonio*. She is also said to have agreed to 19,600 Merks as the Price of the Lands; that *John Gillespie* had paid her 700 Merks, and the Lands are burdened with Payment of the remaining 4900 Merks to her Children at her Death, and, for this, she was to get, in the mean time, the Interest of 900 Merks paid her by
Gillespie,

Gillespie, and to retain Possession of some Lands, in lieu of the Interest of the other 4000 Merks.

As this was a Transaction that could not bear a thorough Examination, *Gillespie* thought proper to leave nothing in the old Woman's Hands that could enable her Friends, after her Death, nor herself, in case of Recovery, to understand the Nature of it. He gave her no Discharge of the Debts, no Obligation for the Remainder of the sham Price he had offered, but left her Security for that to stand upon the Burden in the Disposition in his Hands, and did not leave her so much as a Copy of it, nor any Document whatever that could assist her to recollect the Import of the Deed that had been taken from her.

Mrs. *Renton*, however, recovered from this heavy Sickness, beyond all Expectation, some Months after the Bargain, and when she began to reflect, she found that she had been stript of the Property of her Estate, but in what Manner she did not know. No Vestige was allowed to remain with her, that could inform her of it: She had neither Money nor Credit left her to seek Redress: She was told that no Money was due to her during her Life, except the pitiful Annualrent of the Sum of 900 Merks, which she refused to accept of.

In this destitute Condition she continued till her Husband returned from *America*, who was surprized to find his Wife turned out of the Mansion-house, and living in a low House near to it, and *Gillespie* acting as Proprietor of the Lands, but could get no Information of the Terms of the Bargain: However, in 1742, he concurred with her, in raising a Reduction, but as *Gillespie* was possessed of the Lands, as well as the Price, they were obliged to the Assistance of a Friend, for raising the Process, and carrying it on for some time, the Expence of which is not yet repaid.

Soon after, Mr. *Renton*, the Husband, died, and the Relict conveyed her Right to her Son *William*, in Trust, and thereafter to Mr. *Menzies*. The Respondent was prevailed on to

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accept of the Trust for her Grandson, *Charles Renton*, then an Infant of eleven Years old, and the Relict having died in 1747, and the Respondent having soon after gone to *England*, no material Procedure was had in the Cause, till his Return in 1756, after which a Proof being allowed of the Reasons of Reduction, the same came in course to be advised by your Lordships, upon the 29th *June* last, and the following Interlocutor was pronounced:

The Lords having advised the State of the Process, Testimonies of the Witnesses, Writs produced, and Debate, find the Reasons of Reduction, of Fraud and Circumvention, relevant and proven; and therefore reduce the Disposition granted by Mary Young to John Gillespie, and the Infestment following thereon quarrelled, and decern accordingly. June 29th, 1759.

The Grounds insisted on by the Pursuers, for reducing this Disposition, though branched out into several Articles in the Libel and Condescendence, resolved chiefly into two, *1mo*, That it was null, as being granted by a Woman, *vestita viro*, without Consent of her Husband. *2do*, That it was elicited from her to her great Lesion, when in an infirm State of Mind, and without any Assistance, and therefore reducible upon the Head of Fraud and Circumvention.

The Defenders Answer to the first Ground, was founded on the Factory granted to Mrs. *Renton*, by her Husband, in 1725, and an Interlocutor of the Lord Ordinary, before whom the Process first came, in November 1747, repelling that Reason of Reduction. Nov. 27, 1747.

But the Lord Ordinary's Interlocutor, which has certainly been owing to some Mistake in stating the Case, cannot conclude the Pursuer, *Charles Renton*, who was then an Infant; his Grandmother, *Mary Young*, having died in the Month of *June* preceeding, as appears by a Certificate from the Parish Register of her Burial, and her confirmed Testament produced, dated in *September* before the Interlocutor; and as he has but lately come to Majority, he has execute a Revocation, and is

intituled to have the Question tried upon the Merits of the Case, without regard to that Interlocutor.

And as to the Import of the Factory granted by *Alexander Renton* to his Wife, it impowers her only to sell his Lands in the Town of *Edinburgh*, or in the Country, but gives her no Power whatever, to sell the Estate of *Greenhill*, or any Lands belonging to her. It is by no means a clear Point, that a Husband could grant such a Power to his Wife. He is by Law her Curator, which implies a Trust, undertaken for her and her Heirs: And though a Curator may consent to the Minor's Deed, after he has considered and examined the Circumstances of it, yet he cannot give an antecedent Consent or Authority to the Minor, either to dispose of Lands, or dilapidate other Effects, without his Concurrence. This would be to allow him to disfranchise the Minor from the Curatory, which the Law does not permit. In the present Case, it is the less necessary to enlarge on this Argument, that no such Power is given by the Factory; no Insinuation in it, that she was to sell or dispose of her own Estate, which was meant to descend to her Children, though he allowed her to sell some Tenements belonging to himself, which were of less Value, and to be sure an extraordinary Power of this kind, which may be doubted if in Law competent, will not be presumed or inferred, if it is not granted in the most express Words.

The *other Ground of Reduction*, which is sustained by the Interlocutor, is clearly founded both in the Condition of the Defunct, the Nature of the Bargain, and the Manner in which it was carried on. The Defunct is proved for a considerable Time, both before and after the Bargain, to have been in such extremity of Sickness and bodily Distress, that no Recovery was expected; she minded nothing that concerned her Family, and was altogether unable to rise out of her Bed, or sit in a Chair, without Support; when they made her Bed, they lifted her in a Pair of Sheets, and laid her on another Bed; she was waked every Night, and prayed for in the Church as

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a dying Person ; her Strength was quite exhausted, so that her Voice could scarcely be heard ; when she spoke to the Minister, her Daughter was obliged to repeat what she said to him ; she imagined her Head was in Fire, when a warm Blanket was put about her, and every one who left her, had it been but for a Night, never expected to meet with her again.

In this extreme Distress of Body and Mind, when she and every one about her, had given up all Thoughts of Life, Mr. *Gillespie* thought proper to have a Disposition drawn out, without any previous Directions from her, conveying the Property of her Lands to him, on Payment of the Sum of 5600 Merks, over and above the Debts due to him, which he calculated to extend to 14,000 Merks, though in reality, after the Payments he had received, they amounted to no more than the Sum of 11,545 Merks, as appears by a Calcul hereto annexed.

The Rental of the Lands, as it then stood, is also subjoined, and appears to amount to 1207 Merks ; so the whole Price mentioned in the Disposition, viz. 19,600 Merks, is not quite 16 and a Quarter Years Purchase. And when *Gillespie's* Debt is restricted to what was truly due, as already stated, it is but a Trifle more than fourteen Years Purchase. It is hardly possible to believe, at any rate, that such Bargain could be agreed to by any Person possessed of Judgment, who was at the Time capable to reflect on what she was doing. But still less is this credible, when your Lordships see it in Proof, that an Offer had been made to her some time before, of twenty-four Years Purchase, by Mr. *Lockhart*, the Superior of the Lands, and that she refused that Offer, as appears from the Deposition of *Allan Colquhoun*, Mr. *Lockhart's* Agent, Page 27, of the State.

The Manner of bringing about this Bargain was entirely correspondent to the sinister Aims which *Gillespie* had in view, and which he accomplished by the Execution of it. Mrs. *Renton*, who was well known to be a Person of great Veracity and Probity, did always insist, during the whole Course of her Life,

Life, that she had given no previous Direction as to drawing this Disposition, or agreeing to the Sale therein set forth ; and though this has been constantly insisted on throughout the Proceedings in this Cause, yet *Gillespie* was never able to contradict it, nor to condescend upon any Person who had had a previous Communing with her on that Subject. Mr. *Dick*, by his Letter in Process, does not pretend that he had any Communing with her, but only that her Son *Alexander* came down with *Gillespie* to *Lanerk*, and talked to him of it. What his Views were, shall be afterwards explained.

And as it was drawn without her Knowledge or Direction, so Care was taken to leave no Vestige or Document that could enable her to comprehend the Enormity of the Lesion she suffered, or to make the proper Application for Redress. It is believed it is the first Instance, where a Person has been prevailed on to dispoise away an Estate without getting the smallest Scrap of Paper for any Part of the Value ; neither a Discharge of the Debts, nor an Obligation for the Balance ; these allowed entirely to rest upon the Disposition, which was in his Hands, and of which he took care to leave her no Copy ; and even by the Disposition no Discharge given to her Husband, who was the proper Debtor in the Debts she had paid out of this scanty Price she got for her Estate, nor of that Part of it which *Gillespie* had formerly received by the Possession of the Lands, but every Claim left open to him against her Husband, and even against herself, upon the Warrantice of the Lands. For though she is taken bound in absolute Warrantice for Lands she had sold little above Half-price, yet he takes up the whole Writs from her, *per averfionem*, without any Inventory, and without declaring the same to be a sufficient Progress, so it was in his Power to distress her upon the Warrantice, and she had no Document left with her to show that she had given him up Titles sufficient to support her Right to the Lands, and to protect her against the Distress.

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Thus was this poor old Woman, dying, in all Appearance to every body, despoiled of her Estate without any previous Agreement ; without any adequate Value ; and without any Document to give her a Claim for the Pittance that was allowed her, or to give a Defence to her Husband for the Debts she had paid for him, or to protect herself against Distress on the Warrantice, or so much as a Receipt for the Titles she had lodged in *Gillespie's* Hands, to defend him against Eviction.

In a word, the Matter is so contrived, as to keep her in Ignorance of what she had done to the Hurt of herself and her Children, and to reduce her to an Inability of seeking Redress, if she did not meet with others who were generous enough to lay out their Money for that Purpose. The Recital of the Facts, without any Commentary or Argument, is sufficient to shew the Justice of the Interlocutor. We shall now consider what is suggested in the Petition, with a View to obtain an Alteration.

The Petitioners seem more inclined to enlarge upon their own favourable Situation, as Purchaser and Creditors to *Gillespie*, for onerous Causes, than upon the particular Circumstances of the Bargain betwixt *Gillespie* and the Defunct. What is said as to both shall be considered. What concerns the Bargain falls naturally to come first under View.

It is said, " That Mrs. *Renton's* Lands were so much incumbered with Debts, that it became a prudent and wise Scheme to dispose of them, and pay her Debts and divide the Balance of the Price among her Children. That this, being a right Thing in itself, will not be presumed the Effect of undue Influence. That the Price was adjusted by *Gillespie* with her and her Son, who will not be supposed wilfully to act against his own Interest, and was much about twenty Years Purchase; ~~and~~ they employed Mr. *Dick*, a Man of unexceptionable Character, to make the Calcul of the Debts and draw the Disposition ; and it appears by his

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“ Letter, he communed with her upon it, and that after
 “ reading the Disposition, *she signed it without any Hesitation.*

“ That tho’ Mrs. *Renton* laboured at that time under a Dis-
 “ ease of Body, yet that is no Reason of Reduction of a Deed,
 “ when the Person is at the Time of a *disposing Mind*, and
 “ there is no Appearance to the contrary from the Proof.
 “ That her Interest was fully secured by the Disposition, in
 “ which the Lands were burdened with the Sums payable to
 “ her, and the Remainder of the Price declared to be applied
 “ in Satisfaction of the Debt. And if the Price had been
 “ lower than what was usually given for Lands at the time,
 “ that will not avoid the Bargain; even Lesion, *ultra dimidium*,
 “ is no Ground of Reduction by the Law of Scotland.”

And great Strefs was laid on the Delays said to have hap-
 pened in carrying on this Process. “ That Mrs. *Renton* did
 “ not raise it till the 1742, after which it was carried on in
 “ a slovenly Manner till 1747, and then allowed to sleep until
 “ the 1756, by which means the Defenders have lost the Evi-
 “ dence of Mr. *Dick* and his Clerk *Brownlee*, which might
 “ have been of great Use to them in clearing the Fairness of
 “ the Bargain.”

These are the chief Allegations that have been offered in
 support of this singular Transaction. But the Sufficiency of
 them shall, in very few Words, be submitted to your Lord-
 ships. It cannot be admitted, that the Situation of Mrs. *Ren-
 ton*’s Estate was such, at the time, as made it prudent in her
 to dispose of it, far less to dispose of it when she was in a dy-
 ing Condition, and had neither Capacity to judge, nor Oppor-
 tunity to get Assistance to enable her to do it in a rational
 Manner. The Lands yielded better than 1200 Merks of Rent,
 of which 800 was possessed by *Gillespie*, which paid more
 than the Annualrent of 14,000 Merks; and she owed no
 Debt but Mr. *Gillespie*’s, which, after the Payments he had
 received, amounted only to 11,545 Merks, a Burden which
 could be no reasonable Motive for throwing away the
 Lands in a Hurry, at an Under-value, when the Proprie-
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tor was not capable to make any Judgment of it. It appears from Mr. *Dick's* Letter, appealed to in the Petition, that he had no Instructions from Mrs. *Renton*, nor any Communing with her about it, until the Disposition was drawn out, and offered to her to be signed, in the Form it now stands. The only Instruction he had was from *Gillespie* his Client, and *Alexander Renton* her Son, a Mason by Profession, and very incapable to judge of those Matters, and misled by *Gillespie* to believe that he was to reap some personal Advantage by the Bargain.

It is unnecessary to say, in a Case of this kind, that the Granter was so far deprived of her Judgment, as not to know what was passing about her; or even that she might not be able to give a Legacy to any of her Children or Friends. The Capacity requisite for an intricate Transaction of this Sort, is very different, where long Continuance of a severe Sickness, without Intermision, had taken such Possession of her Mind, as well as her Body, as to leave no Room for any Thoughts of this World, not even the Care of her Family; when every Day was looked upon to be her last, and her Thought was wholly occupied with the Approaches of Death, and the awful Prospect of Futurity, she was very unfit to enter into intricate Compts and Reckonings of her Brother's and her Husband's Debts, and the Intromissions had by their Creditor: Calculations of the Rental of her Estate; of the Casualties, and other Advantages attending it, and of the Value that might in a reasonable View be expected for it; besides many other Circumstances relating to the Execution of the Bargain, of which she could form no Judgment at the best Time in her Life without Assistance.

In every one of these Particulars she was here deceived by *Gillespie*; she was made to believe, that she owed him 14,000 Merks, when the last Farthing due to him was no more than 11,545 Merks. She was made to believe, that he was giving her an adequate Price for the Lands, when even by his own Misreckoning of the Debt, it comes to no more than sixteen
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and a Quarter-years Purchase; and, when justly stated, is little above *fourteen*; and the other singular Hardships put upon her, in the Manner of the Execution of the Bargain, have been already noticed.

These Circumstances, when taken together, are irresistible: Even separately, might be sufficient to avoid the Bargain. It is impossible for any one to believe, that she would, with her Eyes open, and possessed of the Judgment and Attention necessary to be adhibited in such a Case, have given away her Lands for fourteen, or even sixteen Years Purchase, to *Gillefspie*, who had harrassed her with the utmost Rigour of Diligence, when she had not long before refused to sell them to Mr. *Lockhart*, the Superior, at *twenty-four* Years Purchase.

The Petitioners are at Pains to mince away this Part of the Evidence, "That it is proved only by a single Witness, and many Offers are made, which are not seriously intended, &c." But it is proved, by all the Evidence the Nature of the Thing admits of, by the Gentleman who was trusted by the Superior, being his own Nephew, to make the Offer, and who accordingly made it to the Defunct; and as there is no Reason to doubt, that the Offer was seriously made, with a view to meet with Acceptance, so the Petitioners would have spared these Observations, if they had attended to the other Proof that has been brought of the Value of the Lands.

Your Lordships have in the Proof undoubted Evidence, by Gentlemen of Character, of the Rates at which Lands have been sold in the Neighbourhood about the Time of this Bargain. Mr. *Brown* of *Edmonston* depones, "That he bought the Lands of *Whailphill*, about six or seven Miles off *Greenhill*, at twenty-seven Years Purchase, in the Year 1738." Mr. *Telfer*, "That he bought the Lands of *Symington*, within four Miles, from Mr. *Lockhart*, at upwards of twenty-three Years Purchase, about the same Time; and he depones, that the Lands of *Greenhill* were worth twenty-four Year

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“ Years Purchase in 1732; and that he had then an Offer of
 “ the Lands of *Trolofs*, in the Neighbourhood, at twenty-
 “ four Years Purchase.”

Mr. *Greenshiells* of *Drumbraxhill* “ depones to the Price his —p. 30.

“ Father paid to Mr. *Vere* of *Stonebyres*, for the Lands of *Hill*
 “ and *Bogg*, within a few Miles of *Greenhill*, in 1727, which
 “ comes to about twenty-nine Years Purchase.” And,

Mr. *Hamilton* of *Alton* “ depones to another Purchase made by —p. 30.

“ his Father from *Stonebyres* in the same Year 1727, which comes
 “ to thirty-one Years Purchase of the Rent of the Lands.”

These two Purchases were made five Years before the Disposition to *Gillespie*.

It is unnecessary to mention other Purchases made at later Periods, which have gone at higher Rates. But these Instances, antecedent to the Time of this Bargain, or soon after it, with the Judgment of neighbouring Gentlemen, of the Value of the Lands in question at the time, are sufficient to give Conviction of the Reality of Mr. *Lockhart*'s Offer for these Lands, which was a Half more than *Gillespie*'s Price; and that such Price would not have been offered to any Person, that was capable to give attention to the Case, especially as the Lands of *Greenhill* are known to be better accommodate than many Lands in the Neighbourhood, and the Rents above stated have been paid to *Gillespie* ever since his Entry to the Possession in 1722, down to this Sale in the 1732, and ever since down to the 1757, duly within the Year, without the smallest Deduction for Cefs, Feu-duty, Ministers Stipends, Schoolmasters Fees, or Reparation of Houses, which must make them worth a higher Price than other Lands, where the Rent, as usual, admit of these Deductions.

It is altogether unnecessary to enter here into the Question, What Effect a *lesio ultra dimidium* will have upon a Bargain fairly made, when the Lesion results from Circumstances that afterwards come to their Knowledge. The Case here is far different. The feller drawn in suddenly to conclude a Bar-

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gain in such Terms as the Buyer thought fit to propose to her, when she at the same time is in such Situation as of all others made her most liable to Imposition, and Advantage taken of her Weakness, by wronging her egregiously in every Step of the Transaction. In such Circumstances a smaller Lesion than here occurs will be sufficient to repon against a Bargain, which evidently owed its Birth to the Weakness of the one Party, and the Art and Deceit of the other.

To palliate this apparent Imposition, the Petitioner seemed chiefly to rely upon the Concurrence of Mrs. *Renton's* Son, *Alexander*, and the Character of Mr. *Dick*, the Writer, who was employed to draw the Disposition.

But as *Alexander*, who was bred a Mason, and quite unacquainted with Business, was at any rate no competent Judge of such Transactions, so he appears to have been imposed on by *Gillespie*, by a Preference given him in the Distribution then concerted of the Balance of the Price, of which above an half was given to *Alexander*, irrevocably, and independent of his Parents, and payable at his Mother's Death, which was then believed to be at hand, without any Burden of his Father's Liferent; whether he was misled by this Prospect of a present Sum, or by his own Ignorance, or by both, is immaterial. Only so far it appears, that some Temptation was in View. When the Term of Payment of *Alexander's* Sum was postponed by his Mother's unexpected Recovery, *Gillespie* agreed to advance him a Part of it, viz. 500 Merks, upon his being accountable for the intermediate Interest, which shews the Straits he was reduced to, and how easy it was for an artful Man to impetrate his Concurrence to a Scheme he could not judge of, upon the Prospect of a small Sum to supply his present Necessities.

The Petitioners pretend, " That *Alexander* was to get a greater Share of the Balance of the Price, by the Distribution made by his Mother in Mr. *Menzies's* Backbond in 1747, than he got by the Deed signed in 1732." But this is a Mistake.

Mistake. By the Deed 1732, he gets above a Half of the Balance left in *Gillespie's* Hands, whereas by Mr. *Menzies's* Backbond, his Share will not amount to a Fifth of the free Balance of the Price of the Lands, and this still liable to be revoked by his Mother, whereas, by *Gillespie's* Disposition it was unalterable.

There was yet another Handle *Gillespie* had to impose on *Alexander*, which he would not fail to improve to the utmost. The Adjudication, which he had led most unnecessarily in 1723, when he had heritable Security, and got due Payment of his Annualrents, was less than a Year from expiring at this time; and it was easy to make *Alexander* believe, that, without an immediate Sale, the Estate would be carried off without giving him a Shilling. He was not so well skilled in the Law as to know, that an Adjudication led upon a personal Bond of a married Woman, granted, *stante matrimonio*, for principal Sum, Annualrent and Penalties, accumulate into one Sum, was void, and could not be the Foundation of an expired Legal. He believed the Estate was just to be carried off by *Gillespie* on his Diligence, and under that Deception might naturally think it reasonable to accept of any Sum he was pleased to offer.

And indeed there needs no more to shew the Insufficiency of *Alexander's* Concurrence to add Weight to any Transaction, than the Part he acted in the Submission he was brought in to sign for his Son in 1752. It appears from the Proof, that he would not offer to prove either the Sickneſs in which his Mother was, at the Time of signing the Disposition, or that the Lands were of greater Value than what *Gilespe* was to pay for them, nor any of the other Reasons of Reduction. And when the Arbiter was at the Trouble to call for him and his Son, and ask them particularly if they intended to bring any Proof of the Reasons of Reduction, they told him they intended to bring none, though the Facts had been fully set forth in the Libel drawn out by his Mother's Direction, while in Life, and have been since proved, to your Lordships Satisfaction.

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Nay, so far did this Weakness, or Incapacity, on the Part of *Alexander* go, that when he was attempting to reclaim his Son's Right, in the foresaid Submission, and to ascertain the Balance due to him by *Gillespie*, he did not so much as require him to produce his Adjudication, or the Grounds of it, or any other Grounds of Debt, to see if they were justly stated, tho' it now appears, upon the Production, that in that, as well as the other Articles of the Bargain, his Mother had been very remarkably imposed on. It is submitted, whether, after these Samples of *Alexander's* Conduct, his Concurrence can, with Reason, be obruded, to add any Weight to this Transaction.

With respect to Mr. *Dick*, it appears that he had no Hand in making the Bargain, so he says himself, in the Letter, so often appealed to in the Petition. " I was noways concerned, nor present at the Sale, till Mrs. *Renton's* Son, and *John Gillespie*, came down to *Lanerk*, and told me of it, and desired me to make a Calcul of the Debts, and state the Balance, which I did ; and then to draw a Disposition and come to *Greenhill* and get it signed. In a little time after I drew the Disposition, and went to *Greenhill* with it." So it appears the Bargain was finished without Mr. *Dick's* Advice, and, as Mrs. *Renton* always averred, without her Knowledge or Direction ; nor has any Proof been attempted to the contrary. *Gillespie* wrought upon *Alexander's* Ignorance with the Temptation of a present Sum, to bring him into his own Terms, and then directs his Doer, Mr. *Dick*, to make the Calcul and draw out the Writings accordingly. The Writings were drawn out at *Lanerk*, and brought, cut and dry, to the dying Woman.

The Petitioners lay Stress upon what Mr. *Dick* says, " That after communing with Mrs. *Renton*, and relating what was represented to him by her Son and *John Gillespie*, she was satisfied, and after reading the Disposition, signed it without any Hesitation."

But

But it is impossible for any one to believe, that any Hint given by Mr. *Dick*, of what had been told him by her Son and *Gillespie*, would give the Defunct full Information of the various Circumstances of this complicated Transaction. It appears from the Proof, that besides her other Distresses, in this apparently dying State, she was exceedingly deaf, and could not hear any thing that was not spoken very loud, so there is no Probability that she could follow Mr. *Dick* in explaining any of the Particulars, as indeed it is like he has not attempted it, trusting to *Gillespie*'s Information, and believing it had been formerly done, and though the Disposition may have been read, yet it cannot be believed, that a Person in her Condition, could have heard or understood one tenth Part of a long intricate Paper, consisting of ten Pages of very close Writ ; and indeed if she had, and was at all possessed of her Judgment, it is hardly possible that she would not have made some Observations upon it. But here there passed nothing of that kind. After the Paper was read, whether heard or not, *she signed it without any Hesitation.* State, p. 11, 14, 16.

Res ipsa loquitur, the Defunct's Mind was wholly taken up with Things of greater Importance. She had given up the World, and had no Suspicion of any sinister Attempts ; when she saw Mr. *Dick* and her Son about her, she thought all was well, and from implicate Trust signed the Papers offered to her, which it is morally speaking impossible she could understand. If she had, she would never have preferred *fourteen* or *sixteen* Years Purchase from *Gillespie*, to the *twenty-four* that had been offered her by Mr. *Lockhart*.

The Petitioners pretend, “ That the separate Deed signed “ by Mrs. *Renton*, containing the Distribution of the 4900 “ Merks payable at her Death amongst her Children, is an “ Evidence that she was thoroughly apprised of the Circumstances of this Transaction, as this Deed was drawn out at “ her own House at *Greenhill*, and must be presumed to have “ been so drawn by her Direction.”

E

But

But the Respondents apprehend, that the Evidence of this Circumstance turns directly the contrary Way. Though the separate Deed may have been drawn out at *Greenhill*, yet the Distribution of the Sum was fully ascertained by the Disposition itself, which was drawn out at *Lanerk*, without any Direction from Mrs. *Renton*, and brought down cut and dry to *Greenhill* to be signed. And there is real Evidence that the Distribution, however it may have suited the Views of her Son *Alexander* and *Gillespie*, who wanted to favour him, in order to obtain his Concurrence, yet was directly contrary to the Sentiments she entertained both before and after, during her whole Life ; for all the Bonds of Provision she ever granted to her Children, were subject to her Power of Revocation, and only payable at the Death of the longest Liver of her and her Husband ; whereas by the Disposition, which was drawn out at *Lanerk*, and extended before she saw it, the greatest Part of the Balance of the Price is made payable to *Alexander*, immediately upon her Death, which they took to be at hand ; but, to secure against all Events, left her no Power to revoke, so, by this Device, her Husband was reduced to Beggary ; and even if she should recover, as she did, she had no Fund of Credit to relieve her Family out of the greatest Straits. These Alterations were framed by *Gillespie* to favour *Alexander*, and obtain his Concurrence, but quite contrary to the Defunct's Sentiments, who was too dutiful a Wife to leave her Husband in Want, and even put it out of her own Power to relieve him, which is the Import of this Deed that was obtruded to her, without her Knowledge or Direction.

The Defenders were at Pains to make Mr. *Dick* act in the Character of Doer for Mrs. *Renton*. But the contrary is evident from all the Circumstances of the Case. He had been Doer for *Gillespie* during the Course of a dozen Years before the Bargain. He had assisted him in acquiring the Debts due by Mrs. *Renton*'s Brother, and was employed to draw the Bond
of

of Corroboration she gave *Gillespie* for the same in 1720, and the four other Bonds he got from her afterwards, down to the Year 1731, and in expeding all the Investments that were taken for *Gillespie* upon these Bonds, so there cannot be any Doubt, that during all that Period he was *Gillespie's* Doer, and in that Quality was employed to draw this Disposition 1732, in behalf of his Client. It would be to load his Memory to suppose, that he had any Trust from Mrs. *Renton*. If he had had, it is agreeable to the Character he bore in the Country, to believe he would have taken better Care of her Interest: But as he had no Trust from her, nor Concern in her Affairs, he understood he had nothing to do but to draw out the Disposition as directed, and when he came to her House to get it signed, he gave her a Hint of the Directions he had received from her Son and *Gillespie*, which behoved to be very general, at least very imperfectly understood by her, who had near lost her Sense of Hearing, and given up all Attention to Things of this World, expecting a Removal from it every Instant. And accordingly it appears she did not enter into any of the Particulars. She did not speak a Word upon the Subject, but either from an absolute Indifference, or implicate Submission to those about her, signed the Paper offered without any Enquiry or Hesitation.

This was not such a Consent as could be sufficient to divest a Person, in this Condition, of her Property, when she was hurt in every Article of the Transaction. In over-rating the Sum of the Debts, in under-rating the Value of the Lands, in suspending the Term of Payment, and leaving her neither Money or Credit, nor Document to apply for Redress, nor even any Document of the Discharge of her Husband's Debts she had cleared; and in the other Wrongs done her in the Execution of the Bargain, as above related.

And as to what is thrown out in the Petition with respect to the Delay of this Process, it must appear somewhat extraordinary,

ordinary, that after *Gillespie* had stript this poor Woman, not only of her Estate, but of every Scrape of Paper she had in the World, and had left her neither Money nor Credit, by which she could apply for Advice, nor any means to know the Circumstances of the Transaction she had been induced to execute, a Complaint should be made on the Part of the Deceiver, or those in his Right, that she did not immediately apply for Redress against a Bargain that had been thus artfully hidden from her, and all means taken away by which she could obtain it. This is like complaining that one who had been tied Hands and Feet did not rise up and make his escape out of the Hands of his Enemies. It was equally impossible for this poor Woman to rescue herself out of the Snare in which she had been intangled. Her Son had been drawn into it himself, and a very improper Person to assist her. Her Husband was on the other Side of the Globe, and it could hardly be expected that a Stranger or remote Relation would interfere in a Matter that had been artfully rendered so intricate and involved, and the Enquiry into the Preliminaries so difficult, by the total Abstraction of every Writing that could give any Light or Information anent it.

The Want of Activity in seeking Redress, will never sanctify a deceitful Transaction, when it is owing to the Inability of the Party, occasioned by the Oppression she has met with. When her Husband returned, and met with a Friend, who had the Charity to lay out the Expence, a Process was raised, and the same Facts asserted by Mrs. *Renton*, which have now come out on Proof, though they were denied by *Gillespie*.

And as to the Petitioners Complaint, " That the Process " was let fall asleep in 1748, by which they lost the Assistance " of Mr. *Dick's* Evidence, and his Clerk, *Brownlee's*." This must still appear more extraordinary, when it is considered, that before this Intermision of the Process, the whole Scene of Fraud had been laid open, and set forth to the Court, not only in the *Libel*, but also in a particular Condescendence, to which

which *Gillespie* had made Answers, that are now redargued by the Proof. When a Man is charged with Fraud, by the Person he has imposed upon, and she dies, during the Dependence, and leaves an *Infant*, of *eleven* Years old, to succeed in her Right, if he were able to clear himself of the Fraud by any material Evidence, it will not be believed he would neglect to do it in time, before the Evidence is lost; and, if he does, it will be but a poor Excuse, that the Process was not vigorously insisted in by the Infant after his Grandmother's Death. Though the Pursuer was *Minor*, yet the Defender, who was charged with the Fraud, was *Major*, and was equally intitled to insist in the Process. Both his Character and Interest called upon him to do it, if he had had any material Evidence to exculpate him of the Charge; and, if he thought fit to adduce none, neither he, nor the Petitioners in his Right, will be allowed to suppose, that his Doer, whom he did not chuse to examine, would have proved more for him, than the Account of the Matter he has now left behind him in Writing, when he could be under no Temptation to hurt *Gillespie*, but rather to represent the Transaction in the most favourable Light it could admit of.

Gillespie's Conduct through the Course of the Process was that of a Man who chuses to fight with long Weapons, after he has got Possession of the other Party's Effects, and to prevent the Cause from coming to a Determination, as long as he could, he retarded the Commencement of the Process, by refusing to give *Mrs. Renton* a Sight of the Disposition; and even when the Process came in, and he was forced to take a Day to satisfy the Production, and an Act extracted, he allowed Certification to pass; and when it was at last put in to the Register, eleven Years after its Date, and the Pursuer extracted it, and satisfied the Production, he craved to see the Extract of his own Disposition, and by all other Arts he could devise, retarded their Procedure as much as he could.

F

When

When Condescendence and Answers were appointed, as usual, to be given in, the Pursuer, in order to make the Condescendence more complete, applied for a Production of the Defender's Grounds of Debt, by a Representation to the Lord Ordinary, advised as far back as *June 1746*, and his Lordship ordered Production; but none was made, till after the Process was awakened in *June 1757*, though the Order was renewed in *January 1748*.

The Pursuer seeing *Gillespie's* Intention to delay, gave in a Condescendence of the Circumstances of Fraud, without waiting the Production, and in *February 1747*, obtained an Act to prove the Facts set forth in the Condescendence. But this was kept open by a Representation for *Gillespie*, craving to be allowed more Time to make Answers to the Pursuer's Condescendence; and when he had been allowed till *June*, he put off the Summer-session by dilatory Defences, and gave in his Answers no sooner than the End of *November 1747*, which were so drawn, as entirely to correspond with his Intention of acknowledging no Part of the true Fact. To instance, but in two of the Reasons of Reduction condescended on.

Act, p. 31. 4^{to}, " She was imposed upon, and made to sign this Disposition, when she was sorely distressed with Sickness, and seemed to be at the point of Death, when she heard ill, and did not understand what they read to her, and she had given no previous Direction to draw the Disposition, as she had made no Agreement anent the Sale of the Lands disposed; but the Disposition was brought to her, cut and dry, upon stamp Paper."

5^{to}, " The Price, which is 19,600 Merks, is not 16 Years Purchase of the Rents of the Lands."

Act, p. 33. Mr. *Gillespie's* Answers are as follows: " The *fourth* Reason of Reduction is false, and denied.— The *fifth* is neither true nor relevant. The Lands were sold at Years Purchase, which was their full Value; and in Bargains of Sale, where there is nothing of Fraud, as there can be no settled Rule,

“ Rule, it is no good Reason, that others might have been found, who would have given a higher Price.”

Here Mr. *Gillespie* denies by the lump the fourth Reason of Reduction, which consisted of two Branches. The Pursuer's severe Sickneſs at the Date of the Deed, and her having given no previous Direction for drawing the ſame. The Truth of the firſt, though denied by him, has been fully proved; and the Denial of the other will be conſidered, as of the ſame ſtamp, when he does not pretend to condeſcend upon any Perſon, to whom theſe previous Directions ſhould have been given, or with whom ſhe had any Communing upon the Terms of the Agreement; and Mr. *Dick*, his Doer, has denied, that he got any ſuch Directions, or had any Communing with her anent the Sale, until he brought down the Diſpoſition, drawn out to be ſigned by her at her own Houſe, when ſhe was lying in the Condition your Lordſhips have obſerved from the Proof.

After ſuch Conduct on *Gillespie's* Part, denying every Circumſtance charged, and now proved, and condeſcending on no Fact that could exculpate him; it is ſubmitted, with what Grace, he or his Succeſſors can complain of the Loſs of the Evidence of his Doer and his Servant, which he ought to have adduced himſelf, if it had been material; but virtually acknowledged it was not, by condeſcending upon no Fact, which he could offer to prove by them, while they were alive.

The Petitioners are pleaſed to make merry with the Occaſion of the Truſtee's Journey into *England* in 1748, by which the Proceſs was allowed to fall aſleep. But as ſuch Liberties are unbecoming, and highly improper in a Caſe of this Kind, where your Lordſhips have found it proven, that an Eſtate was carried off from a dying Woman, by fraudulent Practices, at an Undervalue, the Petitioners can hardly expect they will be able, by any Degree of Wit or Raillery, to laugh the Purſuer out of the Eſtate, which devolves to him by his Grand-mother.

mother. The Trustee is not bound to account to the Petitioners for his Conduct, nor will he say one Word on that Subject. Though he had the Compassion to lend his Assistance to a distressed Friend, it will not be thought that he was bound to neglect every other Business on that account ; and if he could be supposed to have incurred any Neglect, that could not prejudice the Infant, nor benefit the Person who deceived his Grandmother, to whom it was equally competent, in the Absence of the Trustee, to have obtained a Proof of any Facts that could justify him from the Fraud alledged. But it is plain enough that was not his Scheme, as he had no such Facts to prove. His only Plan was to rest upon a Denial of the Facts charged, which he knew to be true, and to endeavour by length of Time and Expence to weary the poor Infant and his Doers out of the Prosecution of his just Right.

It remains only to consider the *two last Points* mentioned in the Petition, viz. *1mo*, " Supposing this Transaction had
" been improperly or unduly conducted, yet the Disposition
" ought not to be reduced *in totum*, but only in so far as to
" give the Pursuer Access to recover the Difference betwixt
" the Price agreed on, and what the Lands might have been
" sold for at the Time."

2do, " That the Reduction, though it was founded against
" Gillespie, cannot affect his Creditors, who got Securities
" from him, or the Purchaser, who bought the Lands from
" him at an adequate Price."

Upon the first Point it is urged, " that the *Roman Law*, so
" famous for its Equity, where there was no Fraud in the
" Bargain itself, where *dolus non dedit causam* ; but there appeared an Inequality in the Price, gave the proper Remedy,
" by the *actio quanti minoris* ; as it cannot be equitable to carry
" the Remedy further than to redress the Wrong : That this
" applies to the present Case, where it was in every View rational in the Defunct to sell ; and the Lesion alledged is
" only in the Lowness of the Price."

But

But besides that it is believed the *Actio quod in rem* does not take place in this Country, nor in the Law of any modern Nation, it could not apply to this Case, were it to be judged of by the *Roman Law*: For that Action was only competent against the Seller, who had, without Fraud, sold a defective Subject at a higher Price than the Buyer would have given, if he had known the Defect. In that Case, the Buyer was intitled to get back the Difference or Excesse above the real Price, which he had been led to give by the Mistake he was under. But where Fraud interveened, there was no place for this Action, when a Party is fraudulently induced to sell his Lands at an Under-value. It is true, in the strictest Terms, that *dolus dedit causam contractui*. Without the Fraud there would have been no such Bargain. *Fraus obest commensui*; and the only just Reparation is, that the Subject should remain with the Proprietor, with all the Advantages attending it. It would be against Justice to allow the Deceiver to take any Profit arising from his Fraud, whether it lies in the Difference of the Value of the Subject at the Time, or in a higher Value that may afterwards accrue to it. Every such Value must accresce to the Proprietor, who is intitled to be put in the same Case as if she had not fallen into the Snare that was laid for her.

And with respect to the Privilege pleaded for the Petitioners, as a *bona fide* Purchaser and onerous Creditors, the Answer is obvious, that the Reduction was brought into Court, and several Interlocutors had passed upon it before any of the Petitioners acquired any Security or Right to the Lands.

The two heritable Bonds granted by *Gillespie*, are dated the 28th of May 1746, to *Andrew Wauch* Fleisher in *Leith*, for the Sum of 400 *l. Sterl.* At this time the Process was not sleeping, on the contrary, it is at this very time, that *Gillespie* was setting his Lands, with this Exception from the Warrantice in the Tacks, that if the Lands were evicted, during the Tack, then the Tacks should be void and null; ~~for they are signed,~~

(26)

~~Some of the said Bonds are dated, and are, as follows~~

Besides, if the Lender's Doer looked into *Gillespie's* Right to the Land, as he would undoubtedly do, he would see, that his Right was only from a Wife, without her Husband's Consent; for she is designed *Mary Young*, Spouse to *Alexander Renton*, late Surveyor at *Largs*, now at *Boston* in *New England*, and he would see, that she is designed heritable Proprietor of the Lands of *Greenhill*, and the Factory there narrated does not narrate any Power from her Husband to sell any Lands at all, but only the Power to contract Debts, heritable or moveable, and to settle Provisions on younger Children, so he saw no Power given her to sell her Lands; so, from the very Face of *Gillespie's* Right, it appeared lame, and might put Fears of Eviction in the Lender, as well as it did in *Gillespie*. If this Borrowing Money would have protected *Gillespie* against the Reduction, it would have been easy for him to have done it, by borrowing to the Value of the Subject, though the Fraud had been never so gross.

The second Bond is dated, *February 21, 1749*, to *James Fleming* in *Boatshaugh*, for the Sum of 4000 Merks, borrowed at *Candlemas* preceeding. It is said, in the Petition, "That *Fleming* lent the Money, by the Advice and Direction of his Brother-in-law, *Mr. Dick*, which is observed as real Evidence of *Mr. Dick's* Sense of the Fairness of the Bargain." But when the Case is attended to, it truly gives no Evidence on that Point. For though the Bargain had been then reduced, he might think there was more Money due to *Gillespie*, of his heritable Bonds, than would pay *Fleming's* Debt. So he might think it of no Importance to him, what came of the Bargain; and by *Mr. Dick's* own Letter it appears, that he was noways concerned, nor present at it, but only drew the Disposition, as he was directed; and therefore it is odd the Petitioner should, from so remote a Circumstance, endeavour to squeeze an Evidence from *Mr. Dick*, quite different and

and incongruous to what appears from his own Letter; and it is very probable that Mr. *Dick* knew nothing of the former heritable Bond, which was wrote and signed at *Leith*; and it is evident Mr. *Fleming's* Money was borrowed before the Process slept; for it was borrowed at *Candlemas* 1749, and the Process was called 2d *February* 1748. Further, Mr. *Dick*, no doubt, like the rest of the World, believed *Gillespie* to be a rich Man, so the heritable Bond was only taken *ad majorem cautelam*; thus there are several of his personal Creditors for 200 *l. Sterling* and upwards.

And as to *James Macharg*, who purchased the Lands in 1753, from the Trustee for *Gillespie's* Creditors, he was fully certiorated of the Pursuer's Claim to the Lands, not only by the Process of Reduction, which had depended several Years before, but also by the Tacks that had been set by *Gillespie* to the Tenants, for many Years before the Purchase, which contained the following Exception from the Warrantice: " Excepting from this present Warrantice, in case the said Lands
" of *Greenhill* shall be evicted from the said *John Gillespie*, or
" his forefairs, at any time during this Tack, then thir
" Presents shall be null, as if the same had never been entered
" into." And as Mr. *Macharg* was thus fully certiorated of the Pursuer's Claim so he took care to avoid all Danger in that respect, by paying no more but a Trifle of the Price, until he should see it finally determined by your Lordships.

Mr. *Macharg* was one of the most considerable Creditors, as appears from the Disposition to the Trustee, for the Behoof of his Creditors. Now, this Disposition was dated the 13th Day of *July* 1752, and the Lands of *Greenhill* were the chief, if not the only Subject disposed, for his Moveables had been all arrested or poulded. And Mr. *Wight*, in the Process of Reduction of a Sale made by *John Gillespie*, of the Stocking of one of his Farms, depones, That in *April* 1752, *John Gillespie* was for selling the Lands of *Greenhill*, but Mr. *Wight* told him it was needless, in the Situation his Affairs were in,

to offer the Lands to Sale, advising, at the same time, first to submit the Reduction of his Right with *Charles* and *Alexander Renton*, and the Submission was accordingly signed the 28th of *April* 1752. And as Mr. *Wight* was his Adviser to call all his Creditors together, and dispone the Lands of *Greenhill* to a Trustee for their Behoof, there can be no Doubt but he told all the Creditors, and Mr. *Macharg* or his Doer, among the rest, of the Situation of these Lands, viz. that there had been a Reduction of them depending in the Court of Session, which was at that time submitted, and they were never sold till that Submission was followed by a Decreet-arbitral, asfoilzying *Gillespie* from that Reduction, which was at *Martinas* 1752. The Land was only sold in *April* 1753; so there can be no question Mr. *Macharg* knew of the Reduction, and of the Manner *John Gillespie* was asfoilzied from it, and we believe he will not deny it. ~~And~~ there is no Pretence for making him a *bona fide* Purchaser upon the Faith of the Records. And as he, on this account, did not pay up the Price, he can lose little by the Reduction of his Author's Right.

But though the Purchaser, Mr. *Macharg*, and the heritable Creditors were to become Losers by the Reduction of this Bargain, they have no Ground of Complaint, because it is owing entirely to their own Fault. A Process that had depended before your Lordships for six Years, concerning their Right to this Estate, could not be a Secret to any of the Petitioners, when they were acquiring Securities upon it. And it was, in Law, a sufficient Interpellation to them, against trusting the contested Title of the Man with whom they dealt.

By the Laws of all Countries, a real Action, which concludes, That the Defender's Right be reduced, and the Pursuer's declared, interpsels the Defender from making an Alienation, *judicii mutandi causa*, and third Parties from dealing with him. The Decreet declares the Right as it stood at the
Com-

Commencement of the Action, and no intermediate Act of the Defenders can prejudice the Effect of it.

The Petitioners are pleased to argue against this established Rule, from the Security the Law has given to Creditors and Purchasers, by the Search of the Records, " That when no " Incumbrance there appears, they are safe to deal with the " Party infest, and it was the Fault of the Pursuer, or his " Predecessor, who did not secure themselves, by using Inhibition on the Dependence."

But here the Petitioners blame the Pursuer, for not using a Precaution, that would have been incongruous and inept. Inhibition is a Diligence, devised to secure personal Debts, or Claims depending for them; but it is not issued upon a real Action, which concludes, declaring the Pursuer's Right: It would be improper it should, as the Judgment following upon it must effectually exclude all *mesne* Alienations.

Nor is this any Infringement upon the Security intended to be given by the Records. They give a rational Security to Purchasers, if properly applied to the Circumstances of the Case, but the Law does not intend, that Purchasers should keep their Eyes shut against every thing else that passes before them. If a Progress is produced for upwards of forty Years, though this is a good Title of Prescription, yet the Purchaser can have no Security, unless he enquire into the Possession had by his Author and his Predecessors; and after he has made that Inquiry, and searched all the Records, it is farther necessary to know, if Processes have been carried on before the Court, upon Inhibitions, or other real Incumbrances, which possibly may not appear on Record for many Years before the farthest Searches that are in use to be made for them.

These are Notorieties which every Purchaser must attend to, before he can rely upon his Author's Right, and none of them can be more easily discovered, than a depending Action at the Instance of the Possessor's Author, concluding that the Right granted to him, was null and void, which of course

must cut down all Rights derived from him, as the Branches of a Tree must fall, when the Ax is applied to the Root.

The Petitioners at last insist, “ That if the Securities granted by *Gillespie*, during the Dependence of the Process of Reduction, were supposed to be liable to Challenge, yet the Challenge flies off, when the Process is allowed to sleep, because by *mora* the Effect of the Litigiousity ceases; and refer to two Decisions on this Point, 21st July 1627, *Macculloch* contra *Hamilton*, and 23d July 1674, *Johnston* contra *Johnston*.”

These Decisions occurred in the Case of Diligences by Apprising, where, after *Denunciation*, the Subject is rendered *litigious*, in favour of the Creditor; but if he does not carry on his Diligence, the Privilege ceases. The Denunciation cannot give him a stronger Hold of the Subject, than if it had been brought the Length of a Decreet; and even a Decreet of Apprising or Adjudication will not bar the Debtor from Alienation, if it is allowed to lie over for a Tract of Years, though the Decision mentioned in the Petition, which found *six Years* a sufficient *mora*, has been since altered, and Adjudications have been found to have the Privilege of Litigiousity, though they have lien over for *nine Years* without Infestment, as particularly, December 8, 1736, *Wallace* of *Cornhill*, contra *Jean Barclay*, Dict. vol. 1. p. 559.

But these Cases go upon Principles quite different from the present. A Denunciation of Apprising, or Summons of Adjudication, is only a temporary Bar, or Interpellation, against dealing with the Debtor, because the Decreet itself is no more; and the Reason of both is, that being only Steps of Diligence, intended for recovering Payment of a Debt, though the Debtor cannot *in cursu* disappoint them, yet if the Creditor desert his Diligence, for a considerable Tract of Time, the Debtor is released from the Fetter, as it is naturally to be presumed, that the Creditor has operated his Payment some other

ther Way, else he would not have derelinquished his Diligence.

But this will noways apply to a real Action, or Reduction of a real Right : The Decreet obtained upon such Action is perpetual, though the Obtainer should not insist for Possession till the Approach of the long Prescription ; and as the Decreet is perpetual, so the Action must have its full Effect, as long as it depends in Court : It is not extinguished, though the Dependence should be intermitted for Year and Day, or for more Years : The Process is still in Court, though it is sleeping, and may be wakened by either Party, *ad libitum*, and when it is brought to an End, the Decreet being declaratory, has its Effect from the Summons, and excludes any intermediate Deeds of the Defender, in Prejudice thereof.

And therefore, it is not doubted, that the Reduction pronounced by your Lordships, will be found to have its Effects against the Petitioners, who have contracted with *Gillespie*, since the Commencement of the Action. This is the just Effect it would be entitled to, had the Pursuer been Major, but as he was an Infant, under Pupillarity, when the Process fell asleep, and continued Minor during all that Period, it is the less excusable in the Petitioners, who were in nowise ignorant of his Claim and depending Action, to attempt to cut off his Right, on Pretence of a Delay, that happened during his Minority.

In respect whereof, &c.

JAMES FERGUSON.

R E N T A L

O F T H E

Lands of GREENHILL, in the Year 1732, by
Tacks then subsisting, and now produced.

Merks.

Imprimis, **F**OUR Ploughs of Land, each of
which paid 200 Merks of Silver-
rent; as appears from *William Renton's* Tack here-
with produced, who was Tenant in one Plough, and
from the other Tacks of half Ploughs, here-
with also produced, they paid also Cess, Feu,
Minister's Stipend, Schoolmaster's Fees, and Re-
paration of Houses, and all publick Burdens, *inde* 800
Item, Eight Bolls of sufficient Oat-meal, or six
Pounds *Scots*, for each Boll thereof, at the Ma-
ster's Option. When the Meal is cheap, the Ma-
ster takes the six Pound, and when it is dear, he
takes the Meal, and the Year 1757, when this
Rental was given in, the Boll of Meal in the
Country was 12 *l.* 12 *s.* *Scots*, by which the Master
would gain six Pounds twelve Shillings on every
Boll, and, in other Years past, he would have
gained 2, 3, or 4 *l.* *Scots* on every Boll, on which
Account that Option might justly be reckoned
worth 1 *l.* *Scots* yearly on each Boll, but it shall
only be reckoned fifteen Pence yearly; so the

800

eight

	<i>Merks.</i>
Brought over	800
eight Bolls, with the Option, were and are worth 54 <i>l. Scots</i> , or	81
<i>Item</i> , 48 Kain Hens, or, in the Option of the Master, 5 <i>d.</i> for each Hen,	18
<i>Item</i> , 96 Stone Hay, or 4 <i>d.</i> <i>per</i> Stone, in the Option of the Master,	28 10 8
<i>Item</i> , The leading of 80 Loads of Coals, or 4 <i>d.</i> for every Load, in the Master's Option,	24
<i>Item</i> , 8 <i>l. Scots</i> , called in the Tacks superplus Teind,	12
<i>Item</i> , The whole Tenants to keep four Kine, to go with the Tenant's Milk Kine, valued at 3 <i>l.</i> <i>Scots per</i> Cow, that is 12 <i>l.</i> for the four; <i>vide State</i> , <i>p.</i> 18, 19, and 21, that is 18 Merks,	18
<i>Item</i> , To keep 40 Sheep valued at 20 <i>s. Sterl.</i> by the Witnesses, Pages of the <i>State</i> , 18, 19, 20, 21, that is 18 Merks,	18
<i>Item</i> , To furnish 16 Shearers one Day, at 6 <i>d.</i> each, <i>vide State</i> , <i>p.</i> 18, 21, though the Witness in <i>p.</i> 21, <i>viz.</i> <i>James Hutchison</i> , values the Shear- ers at 10 <i>d. per</i> Day, that is 8 <i>s. Sterl.</i> or in Merks, 7. 2 <i>s.</i> 8 <i>d.</i>	7 2 8
<i>Item</i> , The Lands possessed by <i>Mrs. Renton</i> reckoned at what it was set at to <i>Robert Reid</i> up- on her Death,	200
Total	1207

CALCUL

1933

1948

cc8 1970 1490141

18

81

2 of 32

Year	U.S. should take action (%)	U.S. should not take action (%)
1994	75	25
1996	85	15
1998	80	20
2004	90	10

.21

CALCUL of the Debts due to John Gillespie at Martinmas 1732.

The principal Sums due to John Gillespie, with their Annualrents, down to Martinmas 1732.

		Principal Sums.	
		Merks.	Annualrents.
B OND in 1720 for 8000 Merks		8000	
	Annualrent from Lammas 1720 to Martinmas 1752, being twelve Years and a Quarter	-	4900
Bond 1721 for 2000 Merks		2000	
	Annualrent from Lammas 1721 to Martinmas 1732, being eleven Years and a Quarter	-	1125
Bond 1725 for 400 Merks		400	
	Annualrent from Lammas 1725 to Martinmas 1732, being seven Years and a Quarter	-	145
Bond 1727 for 1300 Merks		1300	
	Annualrent from Candlemas 1727 to Martinmas 1732, being five Years three Quarters	-	377
Bond 1731, 1000 Merks		1000	
	Annualrent to Martinmas 1732, being a Year and a Quarter, the Annualrent commencing at Lammas 1731	-	62 6 8
The whole principal Sums		12700	
K		The	

The whole Annualrents to <i>Martinmas</i> 1732	6609 6 8
Deduce 100 Merks owned in the Adjudication to be received from Mr. and Mrs. <i>Rentons</i>	100
Annualrents due at <i>Martinmas</i> 1732	6509 6 8
Total principal Sums	12700
Total Principal and Annualrent due at <i>Martinmas</i> 1732	19209 6 8
Deduce <i>Gillespie's</i> Intromission with Rents, amounting to 8000 Merks	8000
Sum due to <i>Gillespie</i> after deducing the 8000 Merks	11209 8 6
Which 11209 Merks 6 s. 8 d. being deduced from the principal Sum of 12700 Merks, leaves 1400 Merks 6 s. 8 d. which incroaches so far upon the principal Sum; so when Mrs. <i>Renton</i> owns that 14000 Merks is due to <i>Gillespie</i> , she owns the whole principal Sum is due, and 1300 Merks more; and consequently she is lesed in these two Sums 1300 Merks and 1400 Merks 6 s. 8 d. that is 2700 Merks 6 s. 8 d.	2700 6 8
But from this is to be deduced the Expence of taking and registrating the Seafines on the heritable Bonds, and the Annualrents of them, from the Dates of the Registrations to <i>Martinmas</i> 1732, amounting, by an Account in	

Brought over
in Process, to 163 l. 6 s. or 245
Merks 2 s. 8 d. which being deduced
from the 2700 Merks 6 s. 8 d.

Merks.
2700 6 8

245 2 8

Leaves 2455 Merks 4 s. in which she is
lesed - - -

2455 4

And this 2455 Merks being deduced
from the 14000 Merks, leaves only
11545 Merks, which is the whole
Sum due to *Gillespie* at *Martinmas*
1732 - - -

14000

2455

11545

And here the Annualrent of the whole principal Sums are
reckoned up to *Gillespie* to *Martinmas* 1732, though the prin-
cipal Sums were incroached upon by the 8000 Merks of Rents,
to the Extent of 1400 Merks before that Period.

That *Gillespie* intromitted with 8000 Merks of Rent at and
preceeding *Martinmas* 1732, appears from his Decreet of poind-
ing the Ground in *July* 1722, and Letters of poinding the
Ground, *October* 3d, said Year, and from his Adjudication in
November 1723, joined to his Receipts granted to the Tenants,
and their Oaths, *State*, p. 17, 18, 19, 20, and collected to-
gether in p. 9, 10, 11, 12, of the Memorial for the Pursuer.
But the Defenders object, that as the Payment of the Rent of
some of the Tenants is only proved by the Oaths of others of
them, this is but parole Evidence, which is not sufficient in
such a case. *Answered.* *Gillespie's* Receipts to *Corsar* are re-
covered, who had one Plough of the Land, as also his Re-
ceipts to *James Carmichael*, who had another Plough. *James*
Hutchison and his Brother had another Plough, and he depones
he paid their Rent to *Gillespie* after the old Lady died, p. 20.
of the *State*. *William Taylor*, who had half a Plough, de-
pones he paid his Rent to *John Gillespie*, p. 18-19, of the *State*,
Here is undoubted Evidence of his Intromission with the Rents

of

of three Ploughs, and an half, and there are but four Ploughs. And three of the Tenants who depone, they swear not only that each of them paid their own Rent to *Gillespie*, but that he received 'also the Rent of two other Ploughs, during the old Lady's Life, and the whole four, after she died. So it is only one half Plough that stands upon parole Evidence; and, considering that he intromitted with all the rest, and had a Title, by his Decreets of poinding the Ground, and Adjudication, to intromit with the whole, and that the other Tenants all depone he did intromit with the whole, there can be no doubt he did intromit with the whole. It is also proved in this Manner; the Defenders acknowledge that he received, in virtue of his Decreet of poinding the Ground, the Annualrent of the two heritable Bonds upon which it proceeded, which amounted to 10,000 Merks. Now the Annualrents of these Bonds at *Martinmas* 1732 amount to 6000 Merks, and there are Receipts of his in Process amounting to 2000 Merks, wherein he speaks not one Word of the Decreet of poinding the Ground, but only the Adjudication. So hence it is clear he intromitted with the 8000 Merks of the Rent, prior to *Martinmas* 1732.

